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22
23 **UNITED STATES DISTRICT COURT
24 DISTRICT OF NEVADA**

25 S. ROWAN WILSON,)
26 Plaintiff,)
27 v.) Case No.: 2:11-CV-1679-GMN-(PAL)
28 ERIC HOLDER, Attorney General of the)
United States et al.,)
Defendants.)

29
30 **THE UNITED STATES'S MOTION TO DISMISS OR,
31 IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

32 Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56, Defendants the
33 United States of America, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and
34

1 the individual defendants in their official capacities (collectively, the United States), by their
2 undersigned counsel, hereby move this Court to dismiss Plaintiff's Complaint or, in the
3 alternative, to enter summary judgment for Defendants. A Memorandum of Points and
4 Authorities accompanies this motion, along with an Appendix of Secondary Material and a
5 Statement of Undisputed Material Facts.

6 Dated: February 3, 2012

7 Respectfully submitted,

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

**MEMORANDUM IN SUPPORT OF THE UNITED STATES'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

INTRODUCTION

One provision of the Gun Control Act of 1968, as amended—18 U.S.C. § 922(g)(3)—prohibits an unlawful user of a controlled substance from possessing a firearm, while another provision—18 U.S.C. § 922(d)(3)—makes it unlawful to sell a firearm while knowing or having reasonable cause to believe that the purchaser is an unlawful user of a controlled substance. Under the Controlled Substances Act, marijuana is classified as a Schedule I controlled substance that cannot be lawfully prescribed and that the general public may not lawfully possess. Although a number of states, including Nevada, have exempted from state criminal prosecution certain individuals who use marijuana for medical purposes,¹ these state laws do not alter the fact that marijuana possession remains prohibited under federal law. To advise federal firearms licensees (“FFLs”) of this basic fact, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) issued an Open Letter to all FFLs on September 21, 2011, stating that “any person who uses . . . marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.” See Compl., Ex. 2-B. The Open Letter further informed FFLs that “if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and “you may not transfer firearms or ammunition to the person.” Id. (quoting 18 U.S.C. § 922(d)(3)).

Alleging that she possesses a medical marijuana registry card issued by the State of Nevada and has been prevented from purchasing a handgun, Plaintiff S. Rowan Wilson claims that 18 U.S.C. § 922(g)(3), 18 U.S.C. § 922(d)(3), an ATF regulation defining certain statutory

¹ As discussed herein, see infra at 5, the federal government does not recognize a medical use for marijuana. Any use in this memorandum of terms such as “medical use” or “for medical purposes” should not be read to suggest otherwise.

1 terms, and ATF's September 2011 Open Letter "prohibit[] a certain class of law-abiding,
 2 responsible citizens from exercising their right to keep and bear arms" and therefore violate the
 3 Second Amendment and the equal protection component of the Fifth Amendment's Due Process
 4 Clause. Compl. ¶ 3. Plaintiff seeks a declaratory judgment, a permanent injunction, and
 5 monetary damages, but she has failed to state a claim for which relief can be granted.

6 First, Plaintiff's claim that § 922(g)(3) violates her Second Amendment rights must fail
 7 because the Ninth Circuit has already rejected a Second Amendment challenge to this provision,
 8 see United States v. Dugan, 657 F.3d 998 (9th Cir. 2011), and that constitutional analysis is not
 9 altered when the provision is applied to prohibit firearm possession by someone who uses
 10 marijuana in accordance with state law but in violation of federal law. Second, because it is
 11 consistent with the Second Amendment to prohibit any and all unlawful drug users from
 12 possessing firearms and because the Second Amendment does not convey a right to sell firearms,
 13 there can be no Second Amendment violation as a result of § 922(d)(3)'s ban on selling firearms
 14 to someone the seller knows or has reasonable cause to believe is an unlawful drug user,
 15 including those who possess a state-issued medical marijuana card as a result of having
 16 affirmatively registered to use marijuana. Third, Plaintiff's equal protection claim fails because
 17 she is not similarly situated to persons who are not violating federal law by using marijuana.
 18 And finally, even if Plaintiff had stated a claim against the federal government, no waiver of
 19 sovereign immunity allows her to recover monetary damages from the United States, whether for
 20 her constitutional damages claims or her conspiracy claim. Accordingly, the Complaint should
 21 be dismissed in its entirety.

22 BACKGROUND

23 I. THE GUN CONTROL ACT AND THE CONTROLLED SUBSTANCES ACT

24 The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220, included a
 25 provision—now codified at 18 U.S.C. § 922(g)—designed "to keep firearms out of the hands of
 26 presumptively risky people," including felons, the mentally ill, fugitives from justice, and

1 unlawful drug users. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983).

2 Specifically, as applied to unlawful drug users, § 922(g)(3) provides that

3 [i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to
4 any controlled substance (as defined in section 102 of the Controlled Substances
5 Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or
ammunition; or to receive any firearm or ammunition which has been shipped or
transported in interstate or foreign commerce.

6 18 U.S.C. § 922(g)(3). To help effectuate the firearm exclusions in § 922(g), Congress also
7 banned selling firearms to the same categories of presumptively risky people; as relevant here,
8 § 922(d)(3) makes it

9 unlawful for any person to sell or otherwise dispose of any firearm or ammunition
10 to any person knowing or having reasonable cause to believe that such person . . .
11 is an unlawful user of or addicted to any controlled substance (as defined in
section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

12 Id. § 922(d)(3).

13 In addition to challenging the constitutionality of these two provisions, Plaintiff also
14 targets 27 C.F.R. § 478.11, a regulation issued by ATF to define certain statutory terms.
15 Specifically, the regulation defines an “[u]nlawful user of or addicted to any controlled
16 substance” as

17 [a] person who uses a controlled substance and has lost the power of self-control
18 with reference to the use of the controlled substance; and any person who is a
19 current user of a controlled substance in a manner other than as prescribed by a
20 licensed physician. Such use is not limited to the use of drugs on a particular day,
or within a matter of days or weeks before, but rather that the unlawful use has
21 occurred recently enough to indicate that the individual is actively engaged in
such conduct. A person may be an unlawful current user of a controlled
22 substance even though the substance is not being used at the precise time the
person seeks to acquire a firearm or receives or possesses a firearm. An inference
of current use may be drawn from evidence of a recent use or possession of a
23 controlled substance or a pattern of use or possession that reasonably covers the
present time

24 27 C.F.R. § 478.11. Additionally, the regulation echoes §§ 922(g)(3) and 922(d)(3) by providing
25 that a “controlled substance” is “[a] drug or other substance, or immediate precursor, as defined
26 in section 102 of the Controlled Substances Act, 21 U.S.C. § 802.” Id.

1 Section 102 of the Controlled Substances Act, in turn, defines “controlled substance” as
 2 “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of
 3 part B of this subchapter [21 U.S.C. § 812].” 21 U.S.C. § 802(6). Since the enactment of the
 4 Controlled Substances Act, marijuana (also known as cannabis) has been classified as a Schedule
 5 I drug. 21 U.S.C. § 812(c), Schedule I(c)(10). By classifying marijuana as a Schedule I drug,
 6 Congress has determined that marijuana “has a high potential for abuse,” that it “has no currently
 7 accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted
 8 safety for use of [marijuana] under medical supervision.” *Id.* § 812(b)(1).² As such, Schedule I
 9 drugs, including marijuana, cannot be legally prescribed for medical use. See 21 U.S.C. § 829;
 10 see also *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (“Whereas
 11 some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for
 12 marijuana.”). Additionally, it is generally unlawful for any person to knowingly or intentionally
 13 possess marijuana. See 21 U.S.C. § 844(a). For Schedule I drugs like marijuana, the only
 14 exception to this ban on possession is for a federally approved research project. See *id.* § 823(f);
 15 see also *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (“By classifying marijuana as a Schedule I
 16 drug, as opposed to listing it on a lesser schedule, the . . . possession of marijuana became a
 17 criminal offense, with the sole exception being use of the drug as part of a Food and Drug
 18 Administration preapproved research study.”).

19 **II. NEVADA’S LAW REGARDING THE MEDICAL USE OF MARIJUANA**

20 Separate and apart from federal law, the State of Nevada also criminalizes the possession
 21 of marijuana. See Nev. Rev. Stat. § 453.336. In 2000, however, Nevada’s Constitution was

22 ² The Controlled Substances Act delegates authority to the Attorney General to reschedule
 23 controlled substances after consulting with the Secretary of Health and Human Services. *Id.*
 24 § 811. The Department of Justice’s Drug Enforcement Agency (“DEA”) has repeatedly denied
 25 petitions to have marijuana removed from schedule I, most recently in 2011. See Notice of
 26 Denial of Petition, 76 Fed. Reg. 40552 (July 8, 2011); see also *Gonzales v. Raich*, 545 U.S. 1, 15
 27 & n.23 (2005). Based largely on scientific and medical evaluations prepared by the Department
 28 of Health and Human Services, DEA has consistently found that marijuana continues to meet the
 criteria for schedule I control. See 76 Fed. Reg. at 40552.

1 amended by initiative petition to add the following provision regarding the medical use of
 2 marijuana:

3 The legislature shall provide by law for . . . [t]he use by a patient, upon the advice
 4 of his physician, of a plant of the genus Cannabis for the treatment or alleviation
 5 of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent
 6 nausea of cachexia resulting from these or other chronic or debilitating medical
 7 conditions; epilepsy and other disorders characterized by seizure; multiple
 8 sclerosis and other disorders characterized by muscular spasticity; or other
 9 conditions approved pursuant to law for such treatment.

10 Nev. Const. art. IV, § 38(1)(a). Pursuant to this constitutional amendment, Nevada enacted
 11 legislation in 2001 that exempts the medical use of marijuana from state prosecution in certain
 12 circumstances. See Nev. Rev. Stat. Ch. 453A. Subject to certain exceptions, the law provides
 13 that “a person who holds a valid registry identification card . . . is exempt from state prosecution
 14 for . . . [a]ny . . . criminal offense in which the possession, delivery or production of marijuana
 15 . . . is an element.” Nev. Rev. Stat. § 453A.200(1)(f).³ This exemption only applies to the extent
 16 that the holder of a registry identification card (i) engages in “the medical use of marijuana in
 17 accordance with the provisions of this chapter as justified to mitigate the symptoms or effects of
 18 the person’s chronic or debilitating medical condition;” and (ii) “[d]o[es] not, at any one time,
 19 collectively possess, deliver or produce more than . . . [o]ne ounce of usable marijuana[,] [t]hree
 20 mature marijuana plants[,] and [f]our immature marijuana plants.” Id. § 453A.200(3).

21 The law also specifies who is eligible to receive a state-issued registry identification card,
 22 requiring applicants to provide, inter alia, “[v]alid, written documentation from the person’s
 23 attending physician stating that . . . [t]he person has been diagnosed with a chronic or debilitating
 24 medical condition.” Id. § 453A.210(2)(a)(1).⁴ The applicant must also provide documentation

25 ³ The statute specifies, however, that cardholders are not exempt from state prosecution for a
 26 number of other crimes related to marijuana use. Id. § 453A.300(1). In addition, a separate
 27 provision of Nevada law specifies that “[a] person shall not own or have in his or her possession
 28 or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or
 29 addicted to, any controlled substance,” and defines the term “controlled substance” by reference
 30 to the federal Controlled Substances Act. Nev. Rev. Stat. § 202.360(1)(c), (3)(a).

31 ⁴ The statute defines the term “chronic or debilitating medical condition” to include AIDS,
 32 cancer, and glaucoma, as well as “[a] medical condition or treatment for a medical condition that
 33 (Footnote continued on following page.)

1 from his or her physician stating that “[t]he medical use of marijuana may mitigate the symptoms
 2 or effects of that condition” and that “[t]he attending physician has explained the possible risks
 3 and benefits of the medical use of marijuana.” Id. § 453A.210(2)(a)(2)–(3). The state-issued
 4 registry identification card is valid for one year and must be renewed by annually submitting
 5 updated written documentation from the cardholder’s attending physician, including proof that
 6 the individual continues to suffer from a chronic or debilitating medical condition. Id.
 7 §§ 453A.220(4), 453A.230. If a cardholder is “diagnosed by the person’s attending physician as
 8 no longer having a chronic or debilitating medical condition, the person . . . shall return the[]
 9 registry identification card[] to the [State] within 7 days after notification of the diagnosis.” Id.
 10 § 453A.240.

11 Nevada’s law governing the medical use of marijuana does not purport to “legalize”
 12 medical marijuana, but rather specifies the limited circumstances under which the possession of
 13 limited amounts of marijuana for medical use is exempt from state prosecution. This fact is
 14 evidenced by the overall structure of the statute, as well as by the act’s inclusion of a directive
 15 instructing the next session of the Nevada legislature to “review statistics provided by the
 16 legislative counsel bureau with respect to . . . [w]hether persons exempt from state prosecution
 17 [under] this act have been subject to federal prosecution for carrying out the activities concerning
 18 which they are exempt from state prosecution pursuant to [the act].” Act of June 14, 2001
 19 (Assembly Bill 453), ch. 592, § 48.5. Along these lines, a one-page “Important Notice” posted
 20 on the State of Nevada’s Department of Health and Human Services, Health Division’s website
 21 advises the public that **“ISSUANCE OF A STATE OF NEVADA MEDICAL MARIJUANA**
REGISTRY CARD DOES NOT EXEMPT THE HOLDER FROM PROSECUTION
UNDER FEDERAL LAW.” See Nev. State Health Div., Important Notice (Feb. 12, 2009),

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 26 produces, for a specific patient,” one or more of the following symptoms: (i) cachexia, (ii)
 27 persistent muscle spasms, (iii) seizures, (iv) severe nausea, or (v) severe pain. Id. § 453A.050.
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1 <http://health.nv.gov/PDFs/MMP/ImportantNotice.pdf> (emphasis in original) [App.⁵ at Tab 1]; see
 2 also Nev. State Health Div., Program Facts 2 (Feb. 12, 2009),
 3 <http://health.nv.gov/PDFs/MMP/ProgramFacts.pdf> [App. at Tab 2] (stating, in a two-page
 4 document posted on the Health Division's website, that “[t]he Medical Marijuana law is a state
 5 law, offering protection from state law enforcement only” and that “[t]he federal government
 6 does not recognize the state law and is not bound by it”). A section of the Nevada Health
 7 Division's website answering frequently asked questions also informs the public that cardholders
 8 cannot fill a prescription for medical marijuana at a pharmacy because “[t]he federal government
 9 classifies marijuana as a Schedule I drug, which means licensed medical practitioners cannot
 10 prescribe it.” Nev. State Health Div., Medical Marijuana, Frequently Asked Questions, No. 8,
 11 http://health.nv.gov/MedicalMarijuana_FAQ.htm (last updated Sept. 29, 2011) [App. at Tab 3].
 12 The frequently asked questions page also specifies that a patient may withdraw from the program
 13 by submitting a written statement indicating that he or she wishes to withdraw and by returning
 14 the individual's registry identification card. Id., No. 12.

15 **III. ATF'S SEPTEMBER 2011 OPEN LETTER TO FFLS**

16 On September 21, 2011, ATF issued an “Open Letter to All Federal Firearms Licensees.”
 17 See Compl., Ex. 2-B. The Open Letter first notes that ATF “has received a number of inquiries
 18 regarding the use of marijuana for medicinal purposes and its applicability to Federal firearms
 19 laws” and that the “purpose of this open letter is to provide guidance on the issue and to assist
 20 [FFLs] in complying with Federal firearms laws and regulations.” Id. The Open Letter then
 21 observes that “[a] number of States have passed legislation allowing under State law the use or
 22 possession of marijuana for medicinal purposes” and that “some of these States issue a card
 23 authorizing the holder to use or possess marijuana under State law.” Id. The Open Letter
 24 proceeds to summarize the relevant provisions of federal law, noting (i) that “18 U.S.C.

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 26 ⁵ Pursuant to Local Rule 7-3, the United States has concurrently filed an appendix to this
 memorandum containing secondary materials cited herein.
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1 § 922(g)(3)[] prohibits any person who is an ‘unlawful user of or addicted to any controlled
 2 substance . . .’ from shipping, transporting, receiving or possessing firearms or ammunition;” (ii)
 3 that the Controlled Substances Act lists marijuana as a Schedule I controlled substance and that
 4 “there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes,
 5 even if such use is sanctioned by State law;” (iii) that “18 U.S.C. § 922(d)(3)[] makes it unlawful
 6 for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing
 7 or having reasonable cause to believe that such person is an unlawful user of or addicted to a
 8 controlled substance;” and (iv) that, under 27 C.F.R. § 478.11, ““an inference of current use may
 9 be drawn from evidence of a recent use or possession of a controlled substance or a pattern of
 10 use or possession that reasonable covers the present time.”” Compl., Ex. 2-B (emphasis in
 11 original). The Open Letter then interprets these provisions to draw two conclusions: first, “any
 12 person who uses or is addicted to marijuana, regardless of whether his or her State has passed
 13 legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted
 14 to a controlled substance, and is prohibited by Federal law from possessing firearms or
 15 ammunition.” Id. Second, if an FFL is “aware that the potential transferee is in possession of a
 16 card authorizing the possession and use of marijuana under State law, then [the FFL] ha[s]
 17 ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance” and
 18 “may not transfer firearms or ammunition to the person.” Id. This conclusion holds, the Open
 19 Letter notes, even if the potential transferee answered “no” to Question 11(e) on ATF Form
 20 4473,⁶ which asks, “Are you an unlawful user of, or addicted to, marijuana, or any depressant,
 21 stimulant, or narcotic drug, or any other controlled substance?” Id.; see also Compl., Ex. 2-C.

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⁶ ATF Form 4473 is a firearms transaction record that all potential purchasers are required to complete before receiving a firearm from an FFL. See 27 C.F.R. § 478.124.

1 **IV. PLAINTIFF'S COMPLAINT**

2 According to the Complaint,⁷ Plaintiff applied for a medical marijuana registry card from
 3 the State of Nevada in October 2010. Compl. ¶ 35. Since the age of ten, Plaintiff has
 4 experienced severe menstrual cramps, which she describes as “sometimes debilitating, even
 5 leading to further painful side effects, such as severe nausea and cachexia.” Compl., Ex. 1, ¶ 20.
 6 As part of her application for a registry identification card, Plaintiff “obtained a doctor’s
 7 recommendation for the use of medical marijuana.” Compl. ¶ 36. On May 12, 2011, Nevada
 8 issued a registry identification card to Plaintiff. Id. ¶ 37; see also Compl., Ex. 1-B.

9 Approximately five months later, on October 4, 2011, Plaintiff visited Custom Firearms
 10 & Gunsmithing, a federally licensed gun store in Moundhouse, Nevada, to purchase a handgun.
 11 In order to effect the transaction, Plaintiff began to complete ATF Form 4473, but left Question
 12 11(e) blank. See Compl., Ex. 1-C. Plaintiff alleges that her “natural inclination” was to answer
 13 “no” to Question 11(e), but that Mr. Frederick Hauseur, IV, the store’s proprietor, informed her
 14 that ATF had “promulgated a policy whereby any person holding a medical marijuana registry
 15 card is automatically considered an ‘unlawful user of, or addicted to marijuana.’” Compl. ¶ 42.
 16 She states that she decided to leave the question blank because she “holds a valid medical
 17 marijuana registry card issued by the State of Nevada, but is clearly not an unlawful user of or
 18 addicted to marijuana.” Id. ¶ 43. When Plaintiff provided the form to Mr. Hauseur, he informed
 19 her that he was prohibited from selling her any firearm or ammunition. Compl., Ex. 1, ¶ 32. Mr.
 20 Hauseur and Plaintiff had known each other for nearly a year, and Mr. Hauseur was previously
 21 aware that Plaintiff possessed a state-issued medical marijuana registry card. Id.; Compl., Ex. 2,
 22 ¶ 11. With that knowledge and having received notice of ATF’s Open Letter, Mr. Hauseur
 23 determined he could not sell Plaintiff a firearm without jeopardizing his status as a FFL. Compl.,
 24 Ex. 2, ¶ 12. Plaintiff alleges more generally that she “presently intends to acquire a functional

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 26 ⁷ The facts alleged in Plaintiff’s Complaint are accepted as true for purposes of the United
 27 States’s Motion to Dismiss.
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1 handgun for use within her home for self-defense but is prevented from doing so" by federal law,
 2 as implemented by ATF. Compl. ¶ 6.

3 On October 18, 2011, Plaintiff filed a three-count Complaint against the United States,
 4 ATF, U.S. Attorney General Eric Holder, ATF Acting Director B. Todd Jones, and ATF
 5 Assistant Director Arthur Herbert.⁸ In Count One, Plaintiff alleges that 18 U.S.C. § 922(g)(3),
 6 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and ATF's September 2011 Open Letter violate her
 7 right to keep and bear arms under the Second Amendment. Compl. ¶¶ 46–51. In Count Two,
 8 Plaintiff alleges that these same "laws and policies" violate her Fifth Amendment right to equal
 9 protection. Id. ¶¶ 52–57. In Count Three, Plaintiff raises a conspiracy claim, alleging that "[t]he
 10 Defendants, and each of them, acted in concert to deprive the Plaintiff of her Second and Fifth
 11 Amendment rights by enacting and enforcing the unconstitutional laws, policies, practices and/or
 12 procedures complained of in this action." Id. ¶ 59. For relief, Plaintiff seeks a declaration "that
 13 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and derivative regulations, such as 27 C.F.R. § 478.11,"
 14 violate the Second Amendment and the Due Process Clause of the Fifth Amendment, as well as
 15 an injunction preventing the enforcement of these laws and regulations. Compl., Prayer for
 16 Relief, ¶¶ 1–3. She also seeks compensatory and punitive damages. Id. ¶ 4.

17 ARGUMENT

18 I. PLAINTIFF'S SECOND AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

19 The Ninth Circuit has held that Congress did not violate the Second Amendment by
 20 prohibiting unlawful drug users from possessing firearms. See United States v. Dugan, 657 F.3d
 21 998 (9th Cir. 2011). This binding holding applies to all unlawful drug users, even those whose
 22 marijuana use is not a crime as a matter of state law. Even if the Ninth Circuit had not already
 23 upheld 18 U.S.C. § 922(g)(3) against a Second Amendment challenge, Plaintiff's claim against

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⁸ Plaintiff names Defendants Holder, Jones, and Herbert in both their official and their individual capacities. A separate, contemporaneously-filed motion to dismiss by the individual defendants addresses the specific reasons why Plaintiff's claims against these defendants in their individual capacities must fail.

1 that provision would still fail because it proscribes activity that falls outside the scope of the
 2 Second Amendment's protections. In any event, because prohibiting possession of firearms by
 3 unlawful drug users, including marijuana users, substantially relates to the important
 4 governmental interests in combatting violent crime and protecting public safety, 18 U.S.C.
 5 § 922(g)(3) does not violate Plaintiff's Second Amendment rights. Plaintiff's challenge to
 6 § 922(d)(3) and to ATF's interpretation of that provision in the September 2011 Open Letter
 7 similarly fails. The Second Amendment does not protect a right to sell firearms. Moreover,
 8 because § 922(g)(3)—which prohibits unlawful drug users' firearm possession—does not violate
 9 the Second Amendment, the fact that § 922(d)(3) might prevent unlawful drug users from
 10 acquiring firearms does not render that provision constitutionally suspect.

11 A. **As Applied to Plaintiff, 18 U.S.C. § 922(g)(3), as Implemented and**
 12 **Interpreted by ATF, Does Not Violate the Second Amendment.**

13 1. **Plaintiff's Second Amendment Challenge to § 922(g)(3) Is Foreclosed**
 14 **By the Ninth Circuit's Decision in Dugan.**

15 The Second Amendment provides: "A well regulated Militia, being necessary to the
 16 security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
 17 U.S. Const. amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), after determining
 18 that the Second Amendment confers an individual right to keep and bear arms, *id.* at 595, the
 19 Supreme Court held that "the District's ban on handgun possession in the home violates the
 20 Second Amendment, as does its prohibition against rendering any lawful firearm in the home
 21 operable for the purpose of immediate self defense," *id.* at 635. The Court's holding was narrow
 22 and addressed only the "core" right of "law-abiding, responsible citizens to use arms in defense
 23 of hearth and home." *Id.* at 634–35 (emphasis added).

24 The Supreme Court also took care to note that, like other constitutional rights, the right to
 25 keep and bear arms is "not unlimited." *Id.* at 626. Although the Supreme Court declined to
 26 "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," it
 27 cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding
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1 prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing
 2 conditions and qualifications on the commercial sale of arms.” Id. at 626–27. The Court
 3 clarified that it was “identify[ing] these presumptively lawful regulatory measures only as
 4 examples” and that its list was not “exhaustive.” Id. at 627 n.26; see also McDonald v. City of
5 Chicago, 130 S. Ct. 3020, 3047 (2010).

6 Following Heller, numerous Second Amendment challenges have been raised against
 7 § 922(g)(3), and not one has succeeded. See, e.g., United States v. Yancey, 621 F.3d 681, 683,
 8 687 (7th Cir. 2010) (holding that § 922(g)(3) was “equally defensible” as, and analogous to, the
 9 categorical bans described as presumptively lawful in Heller and that “Congress acted within
 10 constitutional bounds by prohibiting illegal drug users from firearm possession because it is
 11 substantially related to the important governmental interest in preventing violent crime”); United
12 States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) (“find[ing] that § 922(g)(3) is the type of
 13 ‘longstanding prohibition[] on the possession of firearms’ that Heller declared presumptively
 14 lawful”); United States v. Richard, 350 F. App’x 252, 260 (10th Cir. 2009) (unpublished);
15 United States v. Korbe, Criminal No. 09-05, 2010 WL 2404394, at *3–4 (W.D. Pa. June 9,
 16 2010); United States v. Hendrix, No. 09-cr-56-bbc, 2010 WL 1372663, at *3 (W.D. Wis. Apr. 6,
 17 2010); see also United States v. Patterson, 431 F.3d 832, 835–36 (5th Cir. 2005) (holding, pre-
18 Heller, that although the Fifth Circuit recognized an individual right to bear arms, a criminal
 19 defendant’s Second Amendment challenge to § 922(g)(3) was unavailing).⁹

20 ⁹ United States v. Carter, __ F.3d __, No. 09-5074, 2012 WL 207067 (4th Cir. Jan. 23, 2012), is
 21 not to the contrary. There, the Fourth Circuit found that the government had failed to meet its
 22 burden of establishing a record showing a reasonable fit between § 922(g)(3) and the
 23 government’s important interest in public safety, and it therefore remanded to allow the
 24 government an opportunity to substantiate the record. Carter, 2012 WL 207067, at *7–8. In
 25 doing so, however, the Fourth Circuit noted that the record necessary to justify § 922(g)(3) “need
 26 not be as fulsome as that necessary to justify” other sub-sections of § 922(g) because, unlike the
 other sub-sections, § 922(g)(3) “only applies to persons who are currently unlawful users or
 addicts.” Id. at *6. Indeed, the court proceeded to observe that the government’s burden on
 remand “should not be difficult to satisfy in this case, as the government has already asserted in
 argument several risks of danger from mixing drugs and guns” and noted that the Seventh Circuit
 in Yancey had “identified a number of studies demonstrating ‘the connection between chronic
 drug abuse and violent crime.’” Id. at *7–8.

1 The Ninth Circuit similarly upheld § 922(g)(3) against a Second Amendment challenge in
 2 Dugan. Like the other courts to have considered the issue, the Ninth Circuit found significant
 3 Heller's language indicating that § 922(g)(1)'s prohibition on firearm possession by felons and
 4 § 922(g)(4)'s prohibition on firearm possession by the mentally ill were presumptively lawful.
 5 Dugan, 657 F.3d at 999. The court found that "the same amount of danger" is presented by
 6 allowing habitual drug users to possess firearms because "[h]abitual drug users, like career
 7 criminals and the mentally ill, more likely will have difficulty exercising self-control,
 8 particularly when they are under the influence of controlled substances." Id. The court also
 9 found an important distinction between § 922(g)(3) and the two prohibitions declared
 10 presumptively lawful by Heller that actually favored § 922(g)(3)'s constitutionality—namely,
 11 that "an unlawful drug user may regain his right to possess a firearm simply by ending his drug
 12 abuse," whereas those individuals who have been convicted of a felony or committed to a mental
 13 institution generally face a lifetime ban. Id. The court therefore concluded that "[b]ecause
 14 Congress may constitutionally deprive felons and mentally ill people of the right to possess and
 15 carry weapons, . . . Congress may also prohibit illegal drug users from possessing firearms." Id.
 16 at 999–1000.

17 Although not evident from the face of the opinion, Dugan, like Plaintiff, possessed a
 18 state-issued card exempting him from state prosecution for using marijuana for medical
 19 purposes. See Brief for Appellant at 59, Dugan, 657 F.3d 998 (No. 08-10579), ECF No. 57
 20 ("Here, Mr. Dugan was . . . licensed to grow and use medical marijuana."). Indeed, the central
 21 argument in Dugan's Second Amendment challenge was that "millions of Americans peacefully
 22 engage in the unlawful use of marijuana—and millions more do so legally under state medical
 23 marijuana laws—without engaging in any behavior that would provide a legitimate basis for
 24 excluding them from the reach of the Second Amendment." Id. at 57. The Ninth Circuit,
 25 however, treated Dugan's status as a medical marijuana cardholder as irrelevant to his Second
 26 Amendment claim—and rightly so. Congress has determined that marijuana "has no currently
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1 accepted medical use in treatment in the United States,” 21 U.S.C. § 812(b)(1)(B), and has
2 accordingly specified that it may not be validly prescribed or lawfully possessed, *id.* §§ 829,
3 844(a). Although several states, including Nevada, have taken a different view of marijuana’s
4 potential medical benefits, it is well settled that Congress has authority under the Commerce
5 Clause to criminalize marijuana possession, even if such possession is not also illegal under state
6 law. See Gonzales v. Raich, 545 U.S. 1 (2005); see also Raich v. Gonzales (“*Raich II*”), 500
7 F.3d 850, 861–64 (9th Cir. 2007) (holding, on remand from the Supreme Court, that there is no
8 Ninth Amendment or substantive due process right to use marijuana for claimed medical
9 purposes); Mont. Caregivers Ass’n v. United States, __ F. Supp. 2d __, No. CV 11-74-M-DWM,
10 2012 WL 169771 (D. Mont. Jan. 20, 2012). All users of marijuana are therefore unlawful users
11 of a controlled substance, and Dugan’s holding that Congress may “prohibit illegal drug users
12 from possessing firearms” without violating the Second Amendment applies equally to them all.
13 657 F.3d at 999–1000; see also United States v. Stacy, No. 09cr3695 BTM, 2010 WL 4117276,
14 at *7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment challenge
15 to § 922(g)(3), that “[t]he fact that this particular case involves the alleged lawful use of
16 marijuana under state law does not have any bearing on the presumptively lawful nature of the
17 restriction”). As such, Plaintiff’s claim that her Second Amendment rights have been violated by
18 § 922(g)(3), as interpreted by ATF, must fail.

2. Unlawful Drug Users Fall Outside the Scope of the Second Amendment as Understood at the Adoption of the Bill of Rights.

21 Even if Plaintiff’s Second Amendment challenge to § 922(g)(3) were not foreclosed by
22 Dugan, it would still fail because unlawful drug users are not within the class of law-abiding,
23 responsible citizens historically protected by the Second Amendment. As noted earlier, Heller’s
24 holding was relatively narrow, recognizing only the “core” right of “law-abiding, responsible
25 citizens to use arms in defense of hearth and home.” 554 U.S. at 634–35 (emphasis added).
26 Given this, as well as the Court’s recognition that categorical prohibitions on firearm possession

1 by felons and the mentally ill are presumptively lawful, it is clear that Heller's determination that
 2 the Second Amendment confers an individual right to keep and bear arms cannot be
 3 misconstrued as recognizing a right for all individuals to possess firearms, no matter the
 4 circumstances. Rather, Heller's carefully crafted articulation of the right at the core of the
 5 Second Amendment acknowledges that the Anglo-American right to arms that was incorporated
 6 into the Bill of Rights was subject to certain well-recognized exceptions.¹⁰ Given the relatively
 7 recent history of federal enactments disqualifying felons and the mentally ill from possessing
 8 weapons,¹¹ Heller also teaches that "exclusions [from the right to bear arms] need not mirror
 9 limits that were on the books in 1791," when the Second Amendment was enacted. United
 10 States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); see also id. at 640 ("[Heller] tell[s]

11 us that statutory prohibitions on the possession of weapons by some persons are proper—and . . .
 12 that the legislative role did not end in 1791. That some categorical limits are proper is part of the
 13 original meaning, leaving to the people's elected representatives the filling in of details.").
 14 Nevertheless, the history of the right to arms as it developed in England and the American
 15 colonies is consistent not only with the disarmament of convicted felons and the mentally ill, but
 16 also more broadly supports Congress's authority to prohibit firearm possession by non-law-
 17 abiding citizens, including those who violate drug laws.

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¹⁰ It is "perfectly well settled" that the Bill of Rights embodies "certain guaranties and
 19 immunities which we had inherited from our English ancestors," and "which had, from time
 20 immemorial, been subject to certain well-recognized exceptions, arising from the necessities of
 21 the case." Robertson v. Baldwin, 165 U.S. 275, 281 (1897). The Court similarly recognized that
 22 "[i]n incorporating these principles into the fundamental law, there was no intention of
 23 disregarding the exceptions, which continued to be recognized as if they had been formally
 24 expressed." Id.; see also Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J.,
 25 dissenting) ("The provisions of the Bill of Rights . . . did not create by implication novel
 26 individual rights overturning accepted political norms.").

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¹¹ See Skoien, 614 F.3d at 640-41 ("The first federal statute disqualifying felons from possessing
 28 firearms was not enacted until 1938 . . . [T]he ban on possession by all felons was not enacted
 until 1961. . . . Moreover, legal limits on the possession of firearms by the mentally ill also are of
 20th Century vintage; § 922(g)(4), which forbids possession by a person 'who has been
 adjudicated as a mental defective or who has been committed to a mental institution,' was not
 enacted until 1968." (citations omitted)).

1 Heller identified the right protected by the 1689 English Declaration of Rights as “the
 2 predecessor to our Second Amendment.” 554 U.S. at 593. This document provided, “That the
 3 subjects which are Protestants may have arms for their defense suitable to their conditions and as
 4 allowed by law.” Id. (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689))
 5 (emphasis added). It is undisputed that both before and after its adoption, the English
 6 government retained the power to disarm individuals it viewed as dangerous. Id. at 582.
 7 Moreover, “like all written English rights,” this right to arms “was held only against the Crown,
 8 not Parliament,” id. at 593, and thus its scope was only “as allowed by law.” Significantly, the
 9 English Declaration of Rights did not repeal the 1662 Militia Act, which authorized lieutenants
 10 of the militia (appointed by the King) to disarm “any person or persons” judged “dangerous to
 11 the Peace of the Kingdome,” 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.) (emphasis added), and “was
 12 to remain in force with only insignificant changes for many years to come,” Joyce Lee Malcolm,
 13 To Keep and Bear Arms 123 (1994) [App. at Tab 4]; accord Patrick J. Charles, “Arms for Their
 14 Defence?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and
 15 Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago, 57
 16 Clev. State L. Rev. 351, 373, 376, 382–83, 405 (2009). Since the act was employed against
 17 those viewed as “disaffected or dangerous,” Charles, 57 Clev. State L. Rev. at 376–78,
 18 individuals could be disarmed without any adjudication of wrongdoing.

19 The documentary record surrounding the adoption of the Constitution similarly confirms
 20 that the right to keep and bear arms was limited to “law-abiding and responsible” citizens. In
 21 other words, “it is clear that the colonists, at least in some manner, carried on the English
 22 tradition of disarming those viewed as ‘disaffected and dangerous.’” United States v. Tooley,
 23 717 F. Supp. 2d 580, 590 (S.D. W.Va. 2010). Notably, “Heller identified as a ‘highly
 24 influential’ ‘precursor’ to the Second Amendment the Address and Reasons of Dissent of the
 25 Minority of the Convention of the State of Pennsylvania to Their Constituents,” which “asserted
 26 that citizens have a personal right to bear arms ‘unless for crimes committed, or real danger of
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1 public injury from individuals.” Skoien, 614 F.3d at 640 (quoting Heller, 554 U.S. at 604; 2
 2 Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971) (emphasis added)).
 3 “One reason for considering this proposal ‘highly influential,’ is that it represents the view of the
 4 Anti-federalists – the folk advocating . . . for a strong Bill of Rights.” Tooley, 717 F. Supp. 2d at
 5 590. This proposal demonstrates that, at the time the Constitution was adopted, even ardent
 6 supporters of guaranteeing an individual right to keep and bear arms recognized that criminals
 7 and other dangerous individuals should not enjoy its benefits. Although the Second Amendment
 8 itself proved more “succinct[]” than the Pennsylvania proposal, Heller, 554 U.S. at 659 (Stevens,
 9 J., dissenting), the latter remains probative of how the Amendment’s supporters viewed the
 10 balance between public security and the right to keep and bear arms. See id. at 605 (reaffirming
 11 that “the Bill of Rights codified venerable, widely understood liberties”).

12 The Pennsylvania proposal, moreover, supports the view that “the right to arms does not
 13 preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the
 14 mentally unbalanced, are deemed incapable of virtue.” Don B. Kates & Clayton E. Cramer,
 15 Second Amendment Limitations and Criminological Considerations, 60 Hastings L.J. 1339, 1360
 16 (2009); see also Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-
 17 Defense: An Analytical Framework and Research Agenda, 56 UCLA L. Rev. 1443, 1497 (2009)
 18 (“[A]ny textual or original-meaning limitations on who possesses the right will often stem from
 19 the perception that certain people aren’t trustworthy enough to possess firearms.”); id. at 1510
 20 (opining that “those whose judgment is seen as compromised by mental illness, mental
 21 retardation, or drug or alcohol addiction have historically been seen as less than full
 22 rightholders”); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American
 23 Origins of Gun Control, 73 Fordham L. Rev. 487, 492 (2004); Robert E. Shalhope, The Armed
 24 Citizen in the Early Republic, 49 Law & Contemp. Probs. 125, 130 (1986). Additional historical
 25 support for this understanding of the right is found in nineteenth-century cases upholding state
 26 legislation restricting firearm possession by certain classes of people perceived to be dangerous.
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1 For example, the Missouri Supreme Court held in 1886 that a state law prohibiting intoxicated
 2 persons from carrying firearms did not violate the state constitutional right to keep and bear
 3 arms. State v. Shelby, 2 S.W. 468, 468–69 (Mo. 1886).

4 Courts interpreting the Second Amendment following Heller have recognized the
 5 importance of the Amendment’s historical limitations. See, e.g., Heller v. District of Columbia
 6 (“Heller II”), __F.3d __, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011); United States v.
 7 Chester, 628 F.3d 673 (4th Cir. 2010). Indeed, the First Circuit recently relied, in part, on
 8 historical sources in holding that the right to keep arms does not extend to juveniles. United
 9 States v. Rene E., 583 F.3d 8, 15–16 (1st Cir. 2009), cert. denied, 130 S. Ct. 1109 (Jan. 11, 2010).
 10 The Ninth Circuit has recognized this history as well, noting that “most scholars of the Second
 11 Amendment agree that the right to bear arms was ‘inextricably . . . tied to’ the concept of a
 12 ‘virtuous citizen[ry]’ . . . and that ‘the right to bear arms does not preclude laws disarming the
 13 unvirtuous citizens (i.e. criminals).’” United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir.
 14 2010) (quoting Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law & Contemp.
 15 Probs. 143, 146 (1986)).

16 This history is sufficient to resolve Plaintiff’s challenge to § 922(g)(3). Simply put,
 17 unlawful drug users—a category that includes all marijuana users—are outside the class of “law-
 18 abiding, responsible” citizens historically protected by the Second Amendment. Because the
 19 right to keep arms does not extend to those who are actively engaged in illegal activity,
 20 § 922(g)(3), as interpreted by ATF, cannot violate the Second Amendment. See Hendrix, 2010
 21 WL 1372663, at *3 (“Preventing criminal users of controlled substances from possessing guns is
 22 not a restriction on the values that the Second Amendment protects, which, to repeat, is the right
 23 of law-abiding citizens to possess handguns in their homes for self-protection.”).

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3. In Any Event, As Applied to Marijuana Users, 18 U.S.C. § 922(g)(3) Substantially Relates to the Important Governmental Interest in Protecting Public Safety and Combating Violent Crime.

Even if the Court declines to reach the issue of whether unlawful drug users fell outside the scope of the Second Amendment as understood at the time of its adoption, it should still uphold § 922(g)(3), as applied to all marijuana users, because the statute easily survives heightened review. In Heller, the Supreme Court did not specify which standard of review should be applied in Second Amendment cases, other than to rule out use of rational-basis scrutiny. 554 U.S. at 628 & n.27. This question is still unsettled in the Ninth Circuit: a panel of that court recently took a step towards resolving the issue, holding that “only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment,” although declining to decide “precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights.” Nordyke v. King, 644 F.3d 776, 786 & n.9 (9th Cir. 2011). The Ninth Circuit has decided to rehear that case en banc, however, and the panel opinion has been stripped of precedential force. Nordyke, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). The other courts of appeals that have addressed the standard-of-review issue have uniformly concluded that this type of regulation is, at most, subject to intermediate scrutiny. The Fourth Circuit, for example, recently declined to decide whether firearm possession by unlawful drug users was understood to be within the scope of the Second Amendment’s guarantee at the time of ratification, but then rejected the defendant’s claim that strict scrutiny should apply to his challenge because he purchased the guns at issue for self-defense in the home. United States v. Carter, __ F.3d __, No. 09-5074, 2012 WL 207067, at *4 (4th Cir. Jan. 23, 2012). Instead, the court applied intermediate scrutiny, explaining that “[w]hile we have noted that the application of strict scrutiny is important to protect the core right of self-defense identified in Heller, that core right is only enjoyed, as Heller made clear, by ‘law-abiding, responsible citizens,’” which unlawful drug users “cannot claim to be.” Id. The court noted that it was “join[ing] the other courts of appeals that have rejected the application of strict

1 scrutiny in reviewing the enforcement of § 922(g)(3), or, for that matter, any other subsection of
 2 § 922(g).” Id. at *5; see also Yancey, 621 F.3d at 683 (applying intermediate scrutiny to a §
 3 922(g)(3) challenge); cf. United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying
 4 intermediate scrutiny to challenge to § 922(g)(8)); Heller II, 2011 WL 4551558, at *9 (applying
 5 intermediate scrutiny to review novel gun registration laws). Given this weight of authority,
 6 intermediate scrutiny is the highest standard of review that should potentially apply here.

7 There can be no doubt that § 922(g)(3), as applied to marijuana users, satisfies
 8 intermediate scrutiny. Under intermediate scrutiny, “a regulation must be substantially related to
 9 an important governmental objective.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir.
 10 2009). An important—indeed, compelling—governmental interest is at stake here—namely, the
 11 government’s interest in protecting public safety and preventing violent crime. See United States
 12 v. Salerno, 481 U.S. 739, 748, 750 (1987) (noting that the Supreme Court has “repeatedly held
 13 that the Government’s regulatory interest in community safety can, in appropriate circumstances,
 14 outweigh an individual’s liberty interest” and that the “[g]overnment’s general interest in
 15 preventing crime is compelling”); Schall v. Martin, 467 U.S. 253, 264 (1984) (“The ‘legitimate
 16 and compelling state interest’ in protecting the community from crime cannot be doubted.”); see
 17 also Carter, 2012 WL 207067, at *5 (“We readily conclude in this case that the government’s
 18 interest in ‘protecting the community from crime’ by keeping guns out of the hands of dangerous
 19 persons is an important governmental interest.”); Yancey, 621 F.3d at 684 (“The broad objective
 20 of § 922(g)—suppressing armed violence—is without doubt an important one.”).

21 In terms of evaluating the fit between the indisputably important objectives at stake and
 22 the prohibition in § 922(g)(3), there are several relevant considerations that affect the analysis.
 23 First, intermediate scrutiny, “by definition, allows [the government] to paint with a broader
 24 brush” than strict scrutiny. Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal.
 25 2010) (internal quotation marks and citation omitted). Second, in order to advance its
 26 compelling interests in combating crime and protecting public safety, Congress may need to
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1 make “predictive judgments” about the risk of dangerous behavior. Turner Broad. Sys. v. FCC,
 2 512 U.S. 622, 665 (1994). Such judgments are entitled to “substantial deference” by the courts
 3 because Congress is “far better equipped than the judiciary” to collect, weigh, and evaluate the
 4 relevant evidence and to formulate appropriate firearms policy in response. Id. at 665–66.
 5 Third, “the nature and quantity of any showing required by the government ‘to satisfy heightened
 6 judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility
 7 of the justification raised.’” Carter, 2012 WL 207067, at *6 (quoting Nixon v. Shrink Mo. Gov’t
 8 PAC, 528 U.S. 377, 391 (2000)). Since it is hardly novel—and entirely plausible—that mixing
 9 guns and drugs poses a severe risk to public safety, the government’s burden here is relatively
 10 low. Finally, the government may carry its burden by relying on “a wide range of sources, such
 11 as legislative text and history, empirical evidence, case law, and common sense, as
 12 circumstances and context require.” Id.

13 All of these sources point inexorably to the conclusion that a substantial relationship
 14 exists between § 922(g)(3) as applied to marijuana users and Congress’s goals of protecting
 15 public safety and combatting violent crime. Congress enacted the precursor to what is now
 16 § 922(g)(3) in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Congressional
 17 action was prompted by the “increasing rate of crime and lawlessness and the growing use of
 18 firearms in violent crime.” H.R. Rep. No. 90-1577, at 7 (1968), reprinted in 1968 U.S.C.C.A.N.
 19 4410, 4412. To meet this growing problem, Congress banned certain classes of individuals from
 20 receiving firearms shipped in interstate commerce based on Congress’s determination that access
 21 to guns by those groups of people was generally contrary to the public interest. See Huddleston
 22 v. United States, 415 U.S. 814, 824 (1974) (“The principal purpose of the federal gun control
 23 legislation . . . was to [curb] crime by keeping ‘firearms out of the hands of those not legally
 24 entitled to possess them because of age, criminal background, or incompetency.’” (quoting S.
 25 Rep. No. 90-1501, at 22 (1968))). As the House manager stated during debate on the legislation:

26 [W]e are convinced that a strengthened [firearms control system] can significantly
 27 contribute to reducing the danger of crime in the United States. No one can

1 dispute the need to prevent drug addicts, mental incompetents, persons with a
 2 history of mental disturbances, and persons convicted of certain offenses from
 3 buying, owning, or possessing firearms. This bill seeks to maximize the
 4 possibility of keeping firearms out of the hands of such persons.

5 114 Cong. Rec. 21657, 21784 (1968) (quoted in Huddleston, 415 U.S. at 828; Yancey, 621 F.3d
 6 at 686). Moreover, Congress evidenced a particular concern with marijuana use: “[w]hile the
 7 statute swept in users of several different categories of drugs, marijuana was the only drug
 8 specifically listed by name.” Carter, 2012 WL 207067, at *5 (citing 82 Stat. 1213, 1220–21,
 9 which prohibited receipt of firearms by any person who is ““an unlawful user of or addicted to
 10 marihuana or any depressant or stimulant drug . . . or narcotic drug””).¹²

11 Significantly, Congress is not the only legislative body to draw the conclusion that guns
 12 and drugs do not mix. Rather, as the court in Yancey found significant, “many states have
 13 restricted the right of habitual drug abusers or alcoholics to possess or carry firearms.” 621 F.3d
 14 at 684.¹³ Indeed, Nevada is among the states that have codified an analogue to § 922(g)(3); the
 15 state legislature amended a pre-existing provision in 2003 to specify that “[a] person shall not
 16 own or have in his or her possession or under his or her custody or control any firearm if the
 17 person . . . [i]s an unlawful user of, or addicted to, any controlled substance.” Nev. Rev. Stat.
 18 § 202.360(1)(c). Like § 922(g)(3), the state statute further provides that ““controlled substance”
 19 has the meaning ascribed to it in 21 U.S.C. § 802(6).” Id. § 202.360(3)(a). Taken together, the

20 ¹² As Carter notes in recounting § 922(g)(3)’s legislative history, the “the 1968 enactment . . .
 21 contained a number of loopholes.” Id. at *6. The provision took its current shape with the
 22 enactment of the Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452
 23 (1986).

24 ¹³ See Ala. Code § 13A-11-72(b); Ark. Code Ann. § 5-73-309(7), (8); Cal. Penal Code
 25 § 12021(a)(1); Colo. Rev. Stat. § 18-12-203(1)(e), (f); Del. Code Ann. tit. 11, § 1448(a)(3); D.C.
 26 Code § 22-4503(a)(4); Fla. Stat. § 790.25(2)(b)(1); Ga. Code Ann. § 16-11-129(b)(2)(F), (I), (J);
 Haw. Rev. Stat. § 134-7(c)(1); Idaho Code Ann. § 18-3302(1)(e); 720 Ill. Comp. Stat. 5/24-
 3.1(a)(3); Ind. Code § 35-47-1-7(5); Kan. Stat. Ann. § 21-4204(a)(1); Ky. Rev. Stat. Ann.
 § 237.110(4)(d), (e); Md. Code Ann., Public Safety, 5-133(b)(4), (5); Mass. Gen. Laws ch. 140,
 § 129B(1)(iv); Minn. Stat. § 624.713(1)(10)(iii); Mo. Rev. Stat. § 571.070(1)(1); Nev. Rev. Stat.
 § 202.360(1)(c); N.H. Rev. Stat. Ann. § 159:3(b)(3); N.J. Stat. Ann. § 2C:58-3(c)(2); N.C. Gen.
 Stat. § 14-404(c)(3); Ohio Rev. Code Ann. § 2923.13(A)(4); R.I. Gen. Laws § 11-47-6; S.C.
 Code Ann. § 16-23-30(A)(1); S.D. Codified Laws § 23-7-7.1(3); W. Va. Code § 61-7-7(a)(2),
 (3).

1 state legislation “demonstrate[s] that Congress was not alone in concluding that habitual drug
 2 abusers are unfit to possess firearms.” Yancey, 621 F.3d at 684.

3 This shared legislative judgment is amply supported by academic research and empirical
 4 studies demonstrating the heightened risk to the public safety posed by the possession of firearms
 5 by marijuana users. According to the Bureau of Justice Statistics, a 2004 survey found that
 6 “32% of state prisoners and 26% of federal prisoners said they had committed their current
 7 offense while under the influence of drugs.” Bureau of Justice Statistics, Drugs and Crime Facts,
 8 <http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm> [App. at Tab 5]. Marijuana, moreover, was the most
 9 frequent drug of choice: a 2002 survey of convicted jail inmates found that marijuana was the
 10 most common drug used at the time of the offense, and similar results were found among
 11 probationers. Id. Moreover, the Office of National Drug Control Policy’s (“ONDCP’s”) arrestee
 12 drug abuse monitoring program, which collects data in 10 cities from males 18 years and older at
 13 the point of their involvement in the criminal justice system, found that “[m]arijuana was the
 14 most commonly detected drug in all of the . . . sites in 2010.” ONDCP, ADAM II 2010 Annual
 15 Report, at 20 (2010), available at <http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam2010.pdf> [App. at Tab 6]. In the ten years that ONDCP has been collecting
 16 data, “the proportion of arrestees testing positive for marijuana has never been less than 30
 17 percent of the sample in any of the current 10 sites.” Id. Indeed, “[i]n 2010, in 9 of the 10 sites,
 18 40 percent or more of the arrestees reported [marijuana] use in the prior 30 days.” Id. at 22.

20 This correlation between marijuana use and crime should be no surprise given the well-
 21 documented deleterious effects regular marijuana use has on an individual. Marijuana use is
 22 associated with impaired cognitive functioning, dependence, mental illness, and poor motor
 23 performance. See ONDCP, Fact Sheet: Marijuana Legalization, at 1 (Oct. 2010), available at
 24 http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf [App. at Tab 7]. Marijuana intoxication “can cause distorted perceptions,
 25 difficulty in thinking and problem solving,” and “[s]tudies have shown an association between
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1 chronic marijuana use and increased rates of anxiety, depression, suicidal thoughts, and
 2 schizophrenia.” Id. at 2; see also National Institute of Drug Abuse, Topics in Brief: Marijuana,
 3 at 1 (Dec. 2011), available at https://www.drugabuse.gov/sites/default/files/marijuana_3.pdf
 4 [App. at Tab 8] (noting that marijuana can have wide-ranging effects, including impaired short
 5 term memory, slowed reaction time and impaired motor coordination, altered judgment and
 6 decision-making, and altered mood); id. at 2 (“Population studies reveal an association between
 7 cannabis use and increased risk of schizophrenia and, to a lesser extent, depression and
 8 anxiety.”).

9 The potential risks posed by the firearm possession of someone who uses this mind-
 10 altering substance are clear. Moreover, nothing in these studies indicates that the effects of
 11 marijuana that make it dangerous for a user to possess a firearm are somehow mitigated when a
 12 doctor has indicated that “use of marijuana may mitigate the symptoms or effects of [a chronic or
 13 debilitating medical] condition.” Nev. Rev. Stat. § 453A.210(2)(a)(2). The documented effects
 14 of marijuana use thus corroborate the substantial relationship between § 922(g)(3) and
 15 Congress’s goal of protecting the public’s safety. See Yancey, 621 F.3d at 685 (recognizing that
 16 “habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-
 17 control, making it dangerous for them to possess deadly firearms.”).

18 In addition, the limited temporal reach of § 922(g)(3) helps ensure that it bears a
 19 reasonable fit to the ends that it serves. Unlike most of § 922(g)’s other firearm exclusions,
 20 which may operate as lifetime bans, § 922(g)(3) only applies to those who are currently unlawful
 21 users. See 27 C.F.R. § 478.11 (defining “unlawful user” so that any unlawful use must have
 22 “occurred recently enough to indicate that the individual is actively engaged in such conduct”).
 23 Through this feature, “Congress tailored the prohibition to cover only the time period during
 24 which it deemed such persons to be dangerous.” Carter, 2012 WL 207067, at *7. Moreover,
 25 § 922(g)(3) “enables a drug user who places a high value on the right to bear arms to regain that
 26 right by parting ways with illicit drug use.” Id. The choice is the user’s, and nothing in the

1 Second Amendment “require[s] Congress to allow [the unlawful user] to simultaneously choose
 2 both gun possession and drug abuse.” Yancey, 621 F.3d at 687.

3 Especially given the “substantial deference” afforded to “predictive judgments” made by
 4 Congress in order to advance the nation’s interests, Turner Broad. Sys., 512 U.S. at 665, these
 5 sources demonstrate that § 922(g)(3), as applied to marijuana users, satisfies intermediate
 6 scrutiny. That Plaintiff has registered to use marijuana for purported medical purposes, as
 7 opposed to recreational purposes, does nothing to change the result. Plaintiff may attempt to
 8 argue that § 922(g)(3) is unconstitutional as applied to her because she is a responsible marijuana
 9 user who poses no genuine threat to public safety. But such an argument is clearly precluded by
 10 the Supreme Court’s recognition in Heller that “some categorical disqualifications are
 11 permissible” and that “Congress is not limited to case-by-case exclusions of persons who have
 12 been shown to be untrustworthy with weapons.” Skoien, 614 F.3d at 641 (emphasis added); see
 13 also Tooley, 717 F. Supp. 2d at 597 (“Section 922(g)(9) is of course overbroad in the sense that

14 not every domestic violence misdemeanant who loses his or her right to keep and bear arms
 15 would have misused them against a domestic partner or other family member. Under
 16 intermediate scrutiny, however, the fit does not need to be perfect, but only be reasonably
 17 tailored in proportion to the important interest it attempts to further. As such, intermediate
 18 scrutiny tolerates laws that are somewhat overinclusive.” (citations omitted)); United States v.
 19 Miller, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) (“[T]he nature of the threat posed by gun
 20 violence makes narrowing the scope of gun regulation impracticable.”). Nor can Plaintiff
 21 succeed on a Second Amendment challenge by “disagree[ing] with Congress’ policy decision to
 22 link the firearms prohibition in § 922(g)(3) to the Controlled Substances Act.” Carter, 2012 WL
 23 207067, at *8. As the Fourth Circuit recognized, “[i]n enacting § 922(g)(3), Congress could
 24 have chosen to reexamine the foundations of national drug policy and to identify precisely what
 25 kinds of drug users ought to be prohibited from possessing firearms. Instead, it opted, quite
 26 reasonably, to connect § 922(g)(3)’s prohibition on the carefully studied and regularly updated

1 list of substances contained in the Controlled Substances Act.” Id. Given that § 922(g)(3)’s
 2 means need only be reasonably tailored to its ends, this reasonable legislative judgment is
 3 entirely consistent with the Second Amendment.

4 In sum, a variety of sources, including legislative text and history, empirical evidence,
 5 case law, and common sense, demonstrate that § 922(g)(3), as applied to marijuana users, is
 6 substantially related to the indisputably important government interest in protecting public safety
 7 and preventing crime. It therefore satisfies the requirements of intermediate-scrutiny review,
 8 providing yet another reason why Plaintiff’s constitutional challenge to § 922(g)(3), as
 9 interpreted by ATF, must fail.

10 **B. As Applied to Plaintiff, 18 U.S.C. § 922(d)(3), as Implemented and
 11 Interpreted by ATF, Does Not Violate the Second Amendment.**

12 Given that § 922(g)(3) is consistent with the Second Amendment, Plaintiff’s challenge to
 13 § 922(d)(3), as interpreted by ATF in the September 2011 Open Letter, is similarly unavailing.
 14 First, it is important to note that § 922(d)(3)’s restriction is directed toward firearm sellers, not
 15 the putative purchaser. Nothing in Heller suggests that individuals have a right to sell firearms;
 16 indeed, Heller’s language, indicating that “nothing in our opinion should be taken to cast doubt
 17 on . . . laws imposing conditions and qualifications on the commercial sale of arms,” strongly
 18 suggests otherwise. 554 U.S. at 626–27. Along these lines, only one court to date appears to
 19 have considered a Second Amendment challenge to § 922(d)(3), and it found that there was no
 20 authority indicating that, “at the time of its ratification, the Second Amendment was understood
 21 to protect an individual’s right to sell a firearm.” United States v. Chafin, 423 F. App’x 342, 344
 22 (4th Cir. Apr. 13, 2011) (unpublished). Additionally, the right of “law-abiding, responsible
 23 citizens to use arms in defense of hearth and home” that is at the “core” of the Second
 24 Amendment, Heller, at 634–35, “does not necessarily give rise to a corresponding right to sell a
 25 firearm,” Chafin, 423 F. App’x at 344; cf. United States v. 12 200-Foot Reels of Super 8 mm.
 26 Film, 413 U.S. 123, 128 (1973) (“We have already indicated that the protected right to possess

1 obscene material in the privacy of one's home does not give rise to a correlative right to have
 2 someone sell or give it to others.”).

3 This is not to say that restrictions on the sale of firearms can never implicate Second
 4 Amendment concerns. Yet, even assuming that to be the case, § 922(d)(3) still cannot run afoul
 5 of the Second Amendment because, for all the reasons discussed above, the unlawful drug users
 6 who are precluded from acquiring firearms by the statute's operation may constitutionally be
 7 prohibited from possessing firearms. In other words, given that it is consistent with the Second
 8 Amendment for § 922(g)(3) to prohibit unlawful drug users from possessing firearm, § 922(d)(3)
 9 cannot violate the Second Amendment simply because it blocks that same group from acquiring
 10 firearms.

11 To be sure, in addition to banning the sale of firearms to individuals who are known
 12 unlawful drug users, § 922(d)(3) also prohibits the sale of firearms to individuals who the seller
 13 has reasonable cause to believe are unlawful drug users, including individuals like Plaintiff who
 14 have affirmatively registered to use marijuana. Nothing in this restriction, however, violates the
 15 Second Amendment. Those who hold state-issued medical marijuana cards are either unlawful
 16 drug users or are holding cards that serve them no purpose. Plaintiff has a choice: she can either
 17 retain her Nevada-issued medical marijuana card and forfeit the right to acquire a firearm, or she
 18 can refrain from using marijuana, return her card to the State, and regain the right to acquire a
 19 firearm. Given that Plaintiff has chosen to keep her card, it is reasonable to infer that she has
 20 done so in order to use marijuana. Having made that decision, the “Second Amendment . . . does
 21 not require Congress to allow [her] to simultaneously choose . . . gun possession.” Yancey, 621
 22 F.3d at 687.¹⁴ As a result, Plaintiff has failed to state a Second Amendment claim against either
 23 § 922(d)(3) or ATF's interpretation of that provision.

24
 25 ¹⁴ Indeed, because Plaintiff's inability to acquire a firearm stems from her own decision to retain
 26 her medical marijuana registry card, any injury she suffers is traceable not to Defendants, but to
 27 her own decisionmaking, and is therefore insufficient to confer standing to prosecute her claims.
 See Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006) (“[S]elf-inflicted harm doesn't satisfy the basic requirements for standing.”); Fire

28 (Footnote continued on following page.)

1 **II. PLAINTIFF'S RIGHT TO EQUAL PROTECTION HAS NOT BEEN VIOLATED.**

2 The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state
 3 shall. . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const.
 4 amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court
 5 has found that its protections are encompassed by the Due Process Clause of the Fifth
 6 Amendment and therefore apply to the federal government. Bolling v. Sharpe, 347 U.S. 497
 7 (1954). Count II of the Complaint challenges §§ 922(g)(3) and 922(d)(3), as implemented and
 8 interpreted by ATF, under the equal protection component of the Due Process Clause, Compl.
 9 ¶¶52–57, but this claim is also without merit.

10 The equal protection component of the Due Process Clause “is essentially a direction that
 11 all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr.,
 12 Inc., 473 U.S. 432, 439 (1985). As a result, “[t]o establish an equal protection violation, [the
 13 plaintiff] must show that she is being treated differently from similarly situated individuals.”
 14 Gonzalez-Medina v. Holder, 641 F.3d 333, 336 (9th Cir. 2011). Plaintiff’s equal protection
 15 claim appears to be premised on the theory that the United States is treating holders of medical
 16 marijuana registry cards differently from other law-abiding citizens. See Compl. ¶ 3 (alleging
 17 that “Defendants have prohibited a certain class of law-abiding, responsible citizens from
 18 exercising their right to keep and bear arms”); id. ¶ 4 (“Based on the Defendants’ interpretation
 19 of Section 922(g)(3) of the federal criminal code, the law prohibits law-abiding adults who have
 20 obtained medical marijuana cards pursuant to state law from lawfully purchasing” firearms).
 21 Yet, Plaintiff’s characterization to the contrary, the class of individuals holding state-issued
 22 medical marijuana registry cards is not similarly situated to law-abiding citizens. It is entirely
 23 reasonable for the government to infer that those individuals who have affirmatively registered to

25 Equip. Mfrs. Ass’n v. Marshall, 679 F.2d 679, 682 n.5 (7th Cir. 1982) (“[P]etitioners cannot
 26 allege an injury from one of the options where they can choose another which causes them no
 27 injury”).

1 use marijuana on the basis of chronic medical conditions are, in fact, marijuana users. And
 2 because all users of marijuana are violating federal law, they are not similarly situated to those
 3 citizens who are not violating federal law. See Marin Alliance for Med. Marijuana v. Holder,
 4 F.2d __, 2011 WL 5914031, at *13 (N.D. Cal. Nov. 28, 2011) (finding that those whose drug use
 5 violates the Controlled Substances Act are not similarly situated to those whose use is permitted
 6 by that law). As a result, Plaintiff's Complaint does not allege that she has been "treated
 7 differently from similarly situated individuals," Gonzalez-Medina, 641 F.3d at 336, and it
 8 therefore fails to state an equal protection claim.

9 **III. PLAINTIFF MAY NOT PURSUE CLAIMS FOR MONETARY RELIEF
 10 AGAINST THE UNITED STATES, ATF, OR THE INDIVIDUAL DEFENDANTS
 IN THEIR OFFICIAL CAPACITIES.**

11 To the extent that Plaintiff asserts claims against the United States for monetary relief,
 12 such claims must be dismissed, as the waiver of sovereign immunity claimed by Plaintiff does
 13 not apply to actions for money damages. In seeking monetary relief, Plaintiff does not appear to
 14 distinguish between the claims against the individual Defendants in their personal capacities and
 15 the claims against the United States, ATF, and the individual Defendants in their official
 16 capacities. See Compl. ¶¶ 50, 56 (alleging that Plaintiff has suffered damages "[a]s a direct and
 17 proximate result of the foregoing law, policy, practice and/or procedure, as enacted and
 18 promulgated by the Defendants"); ¶ 59 ("The Defendants, and each of them, acted in concert to
 19 deprive the Plaintiff of her Second and Fifth Amendment rights" (emphasis added)); ¶ 60
 20 ("As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has
 21 suffered and continues to suffer damages"). Nor does she identify the specific parties from
 22 whom she seeks "compensatory and punitive damages" in her prayer for relief. Id. at 10, ¶ 4.

23 The United States, as a sovereign, is immune from suit unless it has waived its immunity.
 24 Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); Levin v. United States, 663 F.3d
 25 1059, 1061 (9th Cir. 2011). The immunity applies regardless of whether a plaintiff sues the
 26 United States, one of its agencies, or one of its officers acting in an official capacity. See Balser
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1 v. Dep't of Justice, Office of U.S. Tr., 327 F.3d 903, 907 (9th Cir. 2003) ("In sovereign
 2 immunity analysis, any lawsuit against an agency of the United States or against an officer of the
 3 United States in his or her official capacity is considered an action against the United States.").
 4 In particular, the United States has not waived its sovereign immunity for damages claims based
 5 on constitutional violations. See Dyer v. United States, 166 F. App'x 908, 909 (9th Cir. 2006)
 6 ("To the extent [plaintiff] sought damages from the United States for allegedly violating his
 7 constitutional rights, his claim was barred by sovereign immunity."); Hamrick v. Brusseau, 80 F.
 8 App'x 116, 116 (D.C. Cir. 2003) ("[T]he United States has not waived sovereign immunity with
 9 respect to actions for damages based on violations of constitutional rights by federal officials,
 10 whether brought against the United States directly . . . or against officers sued in their official
 11 capacities . . .") (internal citations omitted). "A waiver of the Federal Government's sovereign
 12 immunity must be unequivocally expressed in statutory text." Lane v. Peña, 518 U.S. 187, 192
 13 (1996).

14 Plaintiff seeks to avail herself of the waiver of sovereign immunity contained in Section
 15 702 of the Administrative Procedure Act. Compl. ¶ 11 (alleging that the United States "is a
 16 proper defendant in this action pursuant to 5 U.S.C. § 702"). But this waiver only applies to
 17 constitutional claims for non-monetary relief. See 5 U.S.C. § 702 ("An action in a court of the
 18 United States seeking relief other than monetary damages . . ." (emphasis added)); Tucson
 19 Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) ("By its own terms,
 20 § 702 does not apply to claims for 'money damages . . .'). Accordingly, all claims seeking
 21 monetary relief from the United States, ATF, or the individual defendants in their official
 22 capacity must be dismissed.

23 **IV. PLAINTIFF'S CONSPIRACY CLAIM AGAINST THE UNITED STATES MUST
 24 BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.**

25 In addition, to the extent that Plaintiff intends to pursue a common-law conspiracy claim
 26 against the United States, this Court should dismiss the claim for Plaintiff's failure to exhaust her
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1 administrative remedies, as well as under the “due care” exception to the Federal Torts Claim
 2 Act’s waiver of sovereign immunity. Plaintiff asserts a claim for “conspiracy” under Nevada tort
 3 law. See Comp. ¶¶ 58-61. Though Plaintiff’s claim is against “all Defendants,” only the United
 4 States will remain as a party to the conspiracy claim following substitution under the Federal
 5 Employees Liability Reform and Tort Compensation Act (the “Westfall Act”). As set forth in
 6 the accompanying memorandum by the individual defendants, see Memo of Individual
 7 Defendants at 13-14, under the Westfall Act, once the Attorney General or his designee certifies
 8 that an employee was acting within the scope of employment when the claim arose, the action
 9 against the employee in his or her individual capacity “shall be deemed an action against the
 10 United States . . . , and the United States shall be substituted as the party defendant.” 28 U.S.C.
 11 § 2679(d)(1). The Attorney General’s designee in this case has made this certification. See Att.
 12 A to Memo of Individual Defendants. Therefore, the only remaining party to Plaintiff’s tort
 13 claim is the United States.

14 This Court should dismiss the conspiracy claim for lack of subject matter jurisdiction
 15 once the United States is substituted as a party.¹⁵ Under the Federal Torts Claim Act, a plaintiff
 16 cannot proceed in tort against the United States without first seeking administrative resolution of
 17 the claim. 28 U.S.C. § 2675(a). The exhaustion requirement of § 2675(a) is a jurisdictional
 18 limitation. See *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). Here, Plaintiff does not
 19 allege that she exhausted her administrative remedies. Therefore, Plaintiff’s conspiracy claim
 20 against the United States must be dismissed for lack of subject matter jurisdiction. *Id.* (finding
 21 jurisdiction lacking where plaintiff failed to exhaust administrative remedies in tort claim against
 22 the United States as Westfall Act substitute). In addition, to the extent that Plaintiff’s conspiracy
 23 claim challenges the enforcement of 18 U.S.C. §§ 922(d)(3) and (g)(3) and the accompanying
 24 provisions of the Code of Federal Regulations, Plaintiff’s claim is expressly excluded from

25 ¹⁵ The fact that a claim against the United States must immediately fail following substitution
 26 under the Westfall Act does not preclude substitution. See *United States v. Smith*, 499 U.S. 160,
 27 165-66 (1991); *Levin v. United States*, 663 F.3d 1059, 1064 (9th Cir. 2011).

1 coverage under the “due care” exception to the FTCA’s waiver of sovereign immunity. See 28
2 U.S.C. 2680(a) (preserving immunity for “[a]ny claim based upon an act or omission of an
3 employee of the Government, exercising due care, in the execution of a statute or regulation,
4 whether or not such statute or regulation be valid”).¹⁶

5 **CONCLUSION**

6 For the reasons stated herein, Plaintiff’s Complaint should be dismissed in its entirety or,
7 in the alternative, summary judgment should be entered in the favor the United States on all of
8 Plaintiff’s claims.

9 Dated: February 3, 2012

Respectfully submitted,

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19 ¹⁶ Beyond the jurisdictional bar, Plaintiff’s claim must fail under Nevada tort law. In Nevada, a
20 conspiracy requires “the commission of an underlying tort.” Boorman v. Nev. Mem’l Cremation
21 Soc’y, Inc., 772 F. Supp. 2d 1309, 1315 (D. Nev. 2011) (citing Jordan v. State ex rel. Dep’t of
22 Motor Vehicles & Pub. Safety, 110 P.3d 30, 51 (Nev. 2005) (per curiam), abrogated on other
23 grounds by Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670, 672 n.6 (Nev. 2008)). As
24 demonstrated herein, see supra at Argument Parts I-II, and in the individual defendants’
25 memorandum, neither the United States nor any of its employees have committed any actionable
memorandum, neither the United States nor any of its employees have committed any actionable
constitutional tort. In addition, under Nevada law, a plaintiff must prove “an explicit or tacit
agreement between the tortfeasors.” Azpilcueta v. State of Nev. ex rel. Transp. Auth., 2010 WL
2871073, at *3 (D. Nev. 2010) (citing GES, Inc. v. Corbitt, 21 P.3d 11, 15 (Nev. 2001)). Here,
Plaintiff has not alleged any facts to support her conclusory assertion that the Defendants “acted
in concert to deprive Plaintiff of her [constitutional] rights.” Compl. ¶ 59. The claim fails to rise
above mere speculation and accordingly must be dismissed. See Bell Atlantic Corp. v.
Twombly, 550 U.S. 544, 555 (2007).

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PROOF OF SERVICE

I, Alicia N. Ellington, Trial Attorney with the United States Department of Justice, certify that the following individuals were served with **THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** on this date by the below identified method of service:

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DATED this 3rd day of February 2012.

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